

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
Civil Action No. 5:23-cv-349-D-RN**

RONALD JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
	)	
	)	
	)	
v.	)	
	)	
TOWN OF SMITHFIELD, MICHAEL	)	<b><u>TOWN DEFENDANTS' MOTION TO DISMISS</u></b>
SCOTT, in his individual and official	)	
capacity as TOWN MANAGER,	)	
TIMOTHY KERIGAN, in his individual	)	
and official capacity as TOWN HUMAN	)	
RESOURCES DIRECTOR, TERRY	)	
WEST, in his individual and official	)	
capacity as TOWN POLICE DEPT. LT.,	)	
KEITH POWELL, in his individual and	)	
official capacity as TOWN POLICE	)	
CHIEF, MARLON LEE, in his	)	
individual and official capacity as	)	
TOWN COUNCIL MEMBER, THE	)	
JOHNSTON COUNTY SCHOOL	)	
BOARD OF EDUCATION, TODD	)	
SUTTON, in his individual and official	)	
capacity as MEMBER and FORMER	)	
CHAIR, TERRI SESSOMS, in her	)	
individual and official capacity as	)	
MEMBER, TERRY TIPPETT, in his	)	
individual and official capacity as	)	
MEMBER, MICHAEL WOOTEN, in his	)	
individual and official capacity as	)	
MEMBER, and CURRENT CHAIR,	)	
KAY CARROLL, in his individual and	)	
official capacity as MEMBER, KEVIN	)	
DONOVAN, in his individual and official	)	
capacity as MEMBER, SUSAN DOYLE,	)	
DISTRICT ATTORNEY of JOHNSTON	)	
COUNTY, in her individual and official	)	

capacity, RICHARD HOFFMAN, in his )  
individual and official capacity, )  
BENJAMIN O. ZELLINGER, in his )  
individual and official capacity as )  
Special Prosecutor, ANGIE MCLEOD, )  
JIMMY LAWRENCE, DAVID )  
MARSHBURN, and the ESTATE of )  
JOSEPH PRESTON. )  
Defendants. )

Defendants Town of Smithfield, Michael Scott, in his individual and official capacity as Town Manager, Timothy Kerigan, in his individual and official capacity as Town Human Resources Director, Terry West, in his individual and official capacity as Town Police Lt., and Keith Powell, in his individual and official capacity as Town Council Member (hereinafter collectively referred to as the "Town Defendants), by and through counsel, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move the Court to dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

Specifically, Town Defendants move to dismiss the Complaint upon the following grounds:

- 1) Plaintiff's complaint fails to state a claim upon which relief can be granted;
- 2) The claims asserted against the individual Town Defendants in their official capacity are subject to dismissal as duplicative of the claims against the Town of Smithfield;
- 3) Plaintiff's ADA, Title VII, and wrongful discharge claims asserted against the individual Town Defendants are subject to dismissal, as these defendants are not Plaintiff's employer in their individual capacity;

- 4) Plaintiff's Title VII claims are subject to dismissal, as Plaintiff has not asserted facts sufficient to establish a claim;
- 5) Plaintiff's claims brought under Title VII, the ADA, and the FMLA are subject to dismissal, as Plaintiff has not asserted facts sufficient to establish a claim, and because the facts pled in Plaintiff's complaint establish that the decision to terminate Plaintiff's employment was based on legitimate, non-discriminatory, and non-retaliatory grounds;
- 6) Plaintiff's wrongful discharge claim fails as a matter of law, because the factual allegations do not support a claim that Plaintiff's employment was terminated for any reason that violated public policy;
- 7) Plaintiff's claim for abuse of process against the Town Defendants fails because the complaint does not allege facts sufficient to support such a claim;
- 8) Plaintiff's claim for intentional infliction of emotional distress is subject to dismissal because Plaintiff has failed to plead facts showing he suffered severe emotional distress and because the complaint does not sufficiently plead extreme and outrageous conduct on the part of the Town Defendants;
- 9) Plaintiff's defamation claim is subject to dismissal because Plaintiff has failed to sufficiently allege any defamatory statements made by the Town Defendants, because he cannot establish actual malice, as defined by *NY Times v. Sullivan*, 376 U.S. 254 (1964), and because any alleged statements made prior to June 27, 2022 are barred by the statute of limitations;

- 10) Plaintiff's § 1983 Conspiracy claims are subject to dismissal as Plaintiff has failed to plead facts sufficient to establish such a claim;
- 11) The individual Town Defendants are entitled to qualified immunity and public official immunity.

In support of this Motion, Defendant submits a Memorandum in Support, filed concurrently with this Motion.

WHEREFORE, for the reasons stated above and based upon the supporting materials submitted concurrently with this motion, Defendant respectfully requests that the Court enter an order dismissing Plaintiff's claims with prejudice.

This the 8th day of September, 2023.

**HARTZOG LAW GROUP LLP**

*/s/ Dan Hartzog Jr.*  
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Keith Powell, and Marlon Lee*

## CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I electronically filed the foregoing *Motion* with the Clerk of Court using the CM/ECF system, which will send electronic notification to all registered CM/ECF participants.

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This the 8th day of September, 2023.

**HARTZOG LAW GROUP LLP**

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